

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GEROD ANTONIO HARRISON,

No. C 12-00963 YGR (PR)

Plaintiff,

**ORDER DENYING DEFENDANTS
O'KELLY'S AND RODRIGUEZ'S
MOTION TO DISMISS WITHOUT
PREJUDICE**

v.

A. HEDGPETH, et al.,

Defendants.

This is a federal civil rights action. Defendants O'Kelly's and Rodriguez's motion to dismiss on grounds that Plaintiff failed to exhaust his administrative remedies (Docket No. 85) is DENIED without prejudice. These Defendants' grounds for dismissal are more properly raised in a motion for summary judgment. No later than **sixty (60) days** of this Order, Defendants O'Kelly and Rodriguez must renew their arguments in support of dismissal by way of a motion for summary judgment, in light of the Ninth Circuit's recent ruling in *Albino v. Baca*, No. 10-55702, slip op. at 4 (9th Cir. Apr. 3, 2014) (en banc). The summary judgment motion need raise only the issue of nonexhaustion, or other procedural concerns. If the motion is denied, these Defendants can thereafter file a motion for summary judgment addressing the merits of Plaintiff's claims.

Plaintiff shall file any opposition to the aforementioned Defendants' motion within **twenty-eight (28) days** of the date the motion is filed. Defendants shall file a reply within **fourteen (14) days** of the date the opposition is filed. Defendants are reminded that a motion for summary judgment also must be accompanied by a *Rand* notice so that Plaintiff will have fair, timely and adequate notice of what is required of him in order to oppose the motion. *Woods v. Carey*, 684 F.3d 934, 939 (9th Cir. 2012) (notice requirement set out in *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998), must be served concurrently with motion for summary judgment).

The Clerk of the Court is directed to terminate Docket No. 85.

IT IS SO ORDERED.

DATED: April 22, 2014


YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE